88-827

No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1988

WANDA CHARLENE BOSWELL,
individually and as personal representative
of the estate of Joseph Boswell,

Respondent,

vs.

RICHARD WITSCHEN, SHERIFF OF SHERBURNE COUNTY, individually and in his official capacity; JOHN DOE DANIELS, CHIEF JAILER, SHERBURNE COUNTY JAIL, individually and in his official capacity; VALERIE LERO, JAILER, SHERBURNE COUNTY JAIL, individually and in her official capacity; NANCY RIECKEN, JAILER, SHERBURNE COUNTY JAIL, individually and in her official capacity,

Petitioners.

THE COUNTY OF SHERBURNE; DONNY DORF, JAILER, SHERBURNE COUNTY JAIL, individually and in his official capacity; CITY OF ELK RIVER, ELK RIVER FIRE AND AMBULANCE SERVICE, STEVEN DITTBENNER, RALPH BARSODY, JOHN FOLLMER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment provides a pretrial detainee with greater degrees of protection than the protection given an inmate under the Eighth Amendment for denial of emergency medical care.

2. Whether the Court of Appeals, by requiring all facts and broad inferences created by conclusory allegations to be resolved in favor of Plaintiff, imposed a standard which will defeat summary judgment based upon qualified immunity in every case.

3. Will qualified immunity protect jail staff who have met all medical training requirements but who do not recognize a developing medical problem where no proof of wrongdoing or violations of recognized jail standards has been presented?

4. Whether the failure to provide medical training above the level required by state jail regulations states a civil rights claim against the jail administrators in their individual capacity for inadequate training and supervision of subordinates under 42 U.S.C. § 1983 without proof of wrongdoing or a violation of recognized jail standards.

5. Whether inadequate training sufficient to impose civil rights liability upon jail administrators in their individual capacity may be inferred or assumed from a single incident without proof that recognized standards of jail training were violated.

THE PARTIES

Wanda Charlene Boswell, individually and as personal representative of the estate of Joseph Boswell.

Richard Witschen, Sheriff of Sherburne County, individually and in his official capacity; John Doe Daniels, Chief Jailer, Sherburne County Jail, individually and in his official capacity; Valerie Lero, Jailer, Sherburne County Jail, individually and in her official capacity; Nancy Riecken, Jailer, Sherburne County Jail, individually and in her official capacity.

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No. _____

In the

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October Term, 1988

WANDA CHARLENE BOSWELL,
individually and as personal representative
of the estate of Joseph Boswell,

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vs.

RICHARD WITSCHEN, SHERIFF OF SHERBURNE COUNTY, individually and in his official capacity; JOHN DOE DANIELS, CHIEF JAILER, SHERBURNE COUNTY JAIL, individually and in his official capacity; VALERIE LERO, JAILER, SHERBURNE COUNTY JAIL, individually and in her official capacity; NANCY RIECKEN, JAILER, SHERBURNE COUNTY JAIL, individually and in her official capacity,

Petitioners.

THE COUNTY OF SHERBURNE; DONNY DORF, JAILER, SHERBURNE COUNTY JAIL, individually and in his official capacity; CITY OF ELK RIVER, ELK RIVER FIRE AND AMBULANCE SERVICE, STEVEN DITTBENNER, RALPH BARSODY, JOHN FOLLMER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Richard Witschen, Steven Daniels, Valerie Lero and Nancy Riecken respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on June 21, 1988, rehearing denied August 11, 1988.

OPINIONS BELOW

The Opinion of the Court of Appeals is officially reported at 849 F.2d 1117 (8th Cir., 1988) (reh. den. August 11, 1988). The opinion of the District Court is unreported. The opinion of the Eighth Circuit Court of Appeals is reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1988. Appendix A (hereinafter "App. A"). Petitioners sought a rehearing which was denied on August 11, 1988. The Trial Court denied Petitioners' motion for summary judgment on March 19, 1987. Appendix B (hereinafter "App. B"). This Court has jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment to the Constitution of the United States § 1.

42 USC § 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Sherburne County maintains a full-service jail under the supervision of Sheriff Richard Witschen, a fully trained and state licensed 32-year veteran police officer. As Sheriff, he provided a comprehensive written policy and procedure to govern jail operations (hereafter referred to as "jail policy"). Further, he requires all employees to be fully trained in jail operations including medical training for delivery of first aid and medications. All such training is certified by the Minnesota Peace Officers Standards and Training Board.

Additionally, the Sheriff requires 16 to 21 hours per year in-service training including subjects pertaining to medical care. If medical questions arise concerning the health or welfare of an inmate, each jailer is required to use his or her best judgment, based upon their training and experience and upon the facts and circumstances presented, to assess the need for medical care. Naturally, expenses associated with medical care are absorbed by the County.

Early on March 24, 1984, Respondent was arrested for operating a motor vehicle under the influence of alcohol. Following her arrest, routine procedures disclosed her blood alcohol content to be .13 and that she had two outstanding arrest warrants from other Minnesota counties. She was booked into the jail by Valerie Lero at 1:05 a.m. At that time, Ms. Lero completed all information required for intake procedures and learned that Respondent was about six

and one-half months pregnant, had a history of abnormal discharge and had fainted three days earlier. Due to the warrants, Respondent's release was conditioned upon bail and she was given the opportunity to telephone friends or family for that purpose.

Following the intake procedure, the Respondent was required to take a shower and sanitary napkins were provided due to claims of bleeding. Ms. Lero, herself, had a prior miscarriage; however, the Respondent did not present any factors to her to indicate any need for medical care at that time, nor did Respondent alert Lero or other staff members of a developing condition. The Respondent slept through the night without problem; at 6:30 a.m. Ms. Lero was relieved by Nancy Riecken.

Ms. Riecken was informed as to the above information and woke Respondent at about 7:00 a.m. for breakfast. There was no other contact with the Respondent until another female prisoner was checked in at which time it was noted Respondent was awake but still in her bed. Her request to use the telephone to attempt to raise bail was granted; however, her attempts were unsuccessful.

The next event occurred at approximately 8:15-8:20 or 9:00 a.m. when a routine cell check was being made at which time Respondent informed Ms. Riecken for the first time that she was not feeling well. She "felt funny," which is an experience Ms. Riecken did not see as unusual for individuals withdrawing from alcohol intoxication. However, Ms. Riecken was concerned and did another cell check somewhat earlier than usual wherein it was noted Respondent was still in bed and starting to cry. Upon inquiry, she reported that she was starting to cramp, but the cramps were not too bad. Additionally, she said she was spotting. Ms. Riecken was concerned regarding this matter and kept an audio communication system open so that she could listen to the Respondent. She reported the matter to Sergeant Daniels who instructed she keep alert and contact the other counties as to the bail requirements. At about 10:00 a.m., Elk River Police Officer Tom Tyler came on duty and Ms. Riecken took that opportunity to make inquiries because she knew he had emergency medical training.

Officer Tyler agreed to check the Respondent and found that her distress was becoming more pronounced. After explaining who he was, a visual examination disclosed that she was not dilating, she

was not crowning, the baby had not yet been presented; however, it did appear that some mucus or fluid had been passed. After this inspection, Ms. Riecken asked for a recommendation; and he advised an ambulance. Ms. Riecken immediately directed her shift partner, Donald Dorf, to summon an ambulance which call was received at 10:15 a.m.

The ambulance crew had arrived at the jail by 10:32 a.m.; and their inspection revealed that there was no crowning, no bulging and delivery had not yet begun. Even the senior EMT concluded that there was sufficient time to take her to the hospital.

About one and one-half minutes away from the hospital, the Respondent began delivery. That delivery was completed at the hospital by trained medical personnel. Sometime later that day, the ambulance personnel notified Ms. Reicken that the child did not survive which upset Ms. Riecken and the jail staff.

Thereafter, Respondent filed a civil rights action claiming denial of due process of law under the Fourteenth Amendment and cruel and unusual punishment under the Eighth Amendment. She is seeking compensatory and punitive damages from each of the individual Defendants in their official and individual capacities. Respondent has voluntarily dismissed the City of Elk River, Elk River Fire and Ambulance, Steven Dittbenner, Ralph Barsody and John Follmer.

After discovery was completed, Defendants brought their motion for summary judgment. The Trial Court granted summary judgment for Defendant Dorf, but the motion of the remaining Defendants was denied. Thereafter, Defendants sought an immediate and timely appeal. The Eighth Circuit Court denied Defendants' appeal and subsequent Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

This case presents important questions of individual liability under 42 U.S.C. § 1983 which this Court expressly reserved for future consideration in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98A S.Ct. 2018 (1978) and *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105A S.Ct. 2427 (1985) (reh. den. August 14, 1985) and declined to address in *City of Springfield, Massachusetts v. Kibbe*, ___U.S.___, 107 S.Ct. 1114 (1987).

Here, there are issues of whether or not supervisory personnel can be held personally liable for failure to create more effective policy and procedure and whether or not, in Fourteenth Amendment cases involving pretrial detainees, supervisory personnel can be held personally liable based upon respondeat superior or mere negligence. By denying their motions for summary judgment the Trial Court and the Court of Appeals have established that in Fourteenth Amendment cases involving pretrial detainees negligence is the level of conduct upon which personal liability under § 1983 may be based. This result is in direct conflict with *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986), and answers the question specifically left open in *City of Springfield*, supra.

This case also presents important questions regarding the legal standards for testing qualified immunity in Fourteenth Amendment cases involving pretrial detainees and provides an opportunity for the Court to clear up confusion in the lower courts as to the uncertainty of how to apply the standards set in *Harlow v. Fitzgerald*, 457 U.S. 800, 102A S.Ct. 2727 (1982) and its progeny.

In addition, this case presents this Court with the opportunity to decide whether the single incident rule set out in *Tuttle*, supra, applies to the liability of administrators.

I. The Decision Below Raises Significant And Recurring Problems Concerning The Degrees Of Protection To Be Accorded Pretrial Detainees And Introduces Negligence And Respondeat Superior As A Basis Upon Which Personal Civil Rights Liability May Be Imposed.

The Court of Appeals made note of the fact that this Court has declared negligence insufficient to cause a deprivation of due process under the Fourteenth Amendment but stopped short of adopting the reckless or deliberate indifference standard required for Eighth Amendment claims. The Court of Appeals declined to address that issue because it was "not essential to [the] resolution of this case; and unwise because this question has provoked various responses from the Court of Appeals." The Court went on to further shy

away from the issues by stating that even if the deliberate indifference standard was applied, it was "convinced that Boswell has stated her claims against each of the Appellants with enough particularity to defeat summary judgment on their qualified immunity claims." App. p. A-7.

Thus, the Court below has perpetuated the uncertainty in the lower courts and imposed the facts of this case as a standard contrary to those set by prior rulings of this Court and effectively adopted negligence as a basis to impose individual civil rights liability for violations of Fourteenth Amendment rights in the case of pretrial detainees.

The Court of Appeals resolved all inferences in favor of the Plaintiff and refused to consider the undisputed facts as to the involvement of each of the individual Defendants. Again, as it did in *Creighton v. City of St. Paul,* 766 F.2d 1269, (8th Cir., 1985), it painted the qualified immunity principles with a broad brush of generalized rules of review. Thus, when the results of defense claims of qualified immunity in this case are considered individually it becomes apparent that a new standard for individual civil rights liability has been set which seriously undermines this Court's rulings in *Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662 (1986); *Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668 (1986) and *Harlow v. Fitzgerald,* 457 U.S. 800, 102A S.Ct. 2727 (1982).

Unlike the *Daniels* case, the Plaintiff here alleged a course of conduct which was in "deliberate indifference... to serious medical needs." Thus, this case presents the very issue this Court avoided in *Daniels,* supra, the issue of what standards to apply when artful pleadings employ the magic of pejorative language. See *Daniels,* 106 S.Ct. at 666-667. The Court of Appeals has applied the pleaded language without consideration of principles of qualified immunity; it relied upon conclusory allegations to simply declare a jury question has been created and, thus, set the standard that artful pleadings can avoid the fatal results of *Daniels* and *Davidson.*

The Court should provide guidance on these important and recurring questions concerning the status of pretrial detainees and the standards to apply in testing qualified immunity. As it stands now, to avoid summary judgment in the Eighth Circuit on qualified immunity grounds, all that is required is to plead the magic lan-

guage, file an affidavit alleging ultimate facts and conclusions, and create inferences adverse to the government defendants. These questions are in desperate need of resolution by this Court.

II. The Decision Below Conflicts With The Decisions Of This Court As To The Proper Application Of Qualified Immunity Principles.

A. The Court of Appeals erred when it adopted the principle that in testing qualified immunity claims it can "illuminate the facts of [the] case... in the light most favorable to Boswell." App. p. A-3. Further error occurred when, cast in such light, the Court of Appeals resolved all inferences in favor of the Plaintiff in derogation of the principles set by this Court in its decisions on qualified immunity. The standard thus applied converts the qualified immunity evaluation into a fact-specific test with all facts advanced by the Plaintiff assumed to be true and all inferences thereby crated resolved in favor of the Plaintiff. Under these circumstances the Court of Appeals accepted as true the unsupported allegations of the Plaintiff to create a question of fact where none actually exists and ignored the standards set as recently as 1987. The species of fact-specific evaluation applied by the Court below leads inevitably to the same defective evaluation rejected by this Court in *Anderson v. Creighton*, 107A S.Ct. 3034 (1987).

Under the *Harlow* qualified immunity standard "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 102A S.Ct. at 2738.

In testing qualified immunity claims the Appellate Court reviewing a denial of a Defendant's claim of immunity should not consider the correctness of the Plaintiff's version of the facts or whether or not she has actually stated a claim. The review must focus on the issue of law in determining whether the **legal norms allegedly violated by the defendant were clearly established at the time of the challenged conduct.** That will require some consideration of the factual allegations contained in the Plaintiff's claim, but does not **require**

they be blindly accepted as true. *Mitchell v. Forsyth*, 472 U.S. 511, 105A S.Ct. 2806 (1985). Rather, they are to be tested on an **objective basis.** *Harlow*, supra.

The objective standard requires the comparison of the conduct of the Defendants to clearly established law in a particularized and relevant sense and with the principle that qualified immunity protects **"all but the plainly incompetent or those who knowingly violate the law,"** and **if "it is obvious that no reasonably competent officer"** would have so acted, immunity will be lost. However, **"if officers of reasonable competance could disagree on this issue, immunity should be recognized."** *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 1100 (1986).

In this appeal the Court below avoided the mistakes it made in *Anderson* by shifting its analysis to a method of review not yet examined in detail by this Court in qualified immunity cases. That method of review virtually insures that qualified immunity will always be lost by artfully pleaded claims.

B. The standards for qualified immunity reviewed above will protect government officials who are performing their duties in accordance with their training and without prior notice that those duties are causing constitutional injury.

In this case the Court of Appeals ignored the undisputed fact that State law requires jail personnel be trained at the first aid level, that all of the Defendants have met that training requirement and that they are not accused of wrongdoing or of violating recognized jail standards. The claims are that the Defendants did not react to her condition fast enough, they did not take her to "an appropriate hospital," the staff is inadequately trained and supervised and they failed to have available trained medical personnel; and that the policy adopted by the supervisors was inadequate to meet her needs. These are conclusory allegations unsupported by facts in the record.

The Sheriff promulgated written policy and procedures for jail operations which were approved by the Minnesota Department of Corrections and were in place and operative for years without any incident or claim of defect. The Plaintiff here suffered a sophisticated medical problem with her pregnancy which is an event never experienced by that jail in all of its history of operations. She has not pointed to any prior history indicating defective policy, defective

reaction time, incompetance in delivering first aid level medical care, inadequate training or supervision, or that the hospital the Sheriff contracted with to provide care was substandard. Each of the Defendants in this case was performing his respective duties as he historically understood them to be and with the confidence instilled by a lack of prior complaints or injury.

The Plaintiff has not produced any evidence to indicate the Sheriff was personally involved in the events leading to her distress. Nor has she produced any evidence that the training and supervision provided by the Sheriff and the Chief Jailer is in any manner defective or substandard. Her claim is that it could have been better. Therefore, she is seeking to impose personal liability upon these individuals simply by virtue of their position and is asking that a constitutional violation be inferred by a single unfortunate incident.

III. The Decision Below Conflicts With Prior Decisions Of This Court And Is Inconsistent With The Prior Decisions Of The Eighth Circuit.

A single incident of official misconduct absent more does not impose municipal liability and, by application of that principle, should not impose **personal** liability. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105A S.Ct. 2427 (1985) (reh. den. August 14, 1985).

The evaluation of the motions of the Sheriff and Chief Jailer in this case is inconsistent with the principles of qualified immunity announced by this Court and the Eighth Circuit in *Wilson v. City of North Little Rock*, 801 F.2d 316 (8th Cir., 1986) (No supervisory liability absent a showing the supervisor took an active part in the events causing the constitutional injury.).

The refusal to consider the law relevant to qualified immunity and to apply the facts disclosed during discovery in an objective manner and the refusal to require Plaintiff to come forward and demonstrate genuine issues of material facts exist to preclude summary judgment is inconsistent with this Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106A S.Ct. 2505 (1986) (Properly supported motion for summary judgment requires the opponent to produce evidence to defeat the motion). Here the Plaintiff produced no evidence demonstrating wrongdoing or viola-

tion of recognized jail standards or norms. In ruling on a motion for summary judgment the Court must keep in mind the actual quantum and quality of proof necessary to support the claim and a mere "scintilla of evidence" will not be enough to support a motion. Similarly, given the developing law of qualified immunity, it is not enough to block such a motion. See *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 106 S.Ct. 1348 (1986) (Opponent must point out specific facts showing that there is a genuine issue for trial). Here the discovery is completed and, as this Court said at 1356, "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" The events must be evaluated in an objective factual context and the application of inferences is not, per se, the rule. See also *Celotex Corporation v. Catrett*, 477 U.S. 317, 106A S.Ct. 2548 (1986) (Moving party need not negate every potential fact dispute in order to prevail on summary judgment). The moving party may rely on the record as a whole and the burden shifts to the non-moving party to demonstrate a genuine issue exists. That requires consideration of the record as a whole and does not require a disregard for uncontested facts. Nor does it permit inferences unsupported by facts.

CONCLUSION

For the foregoing reasons this Court should reverse the judgment of the Court of Appeals for the Eighth Circuit and remand for reconsideration.

Respectfully submitted,

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APPENDIX A

In The
United States Court Of Appeals
For The Eighth Circuit

No. 87-5187

WANDA CHARLENE BOSWELL,
individually and as personal representative
of the estate of Joseph Boswell,

Appellee,

vs.

THE COUNTY OF SHERBURNE,

RICHARD WITSCHEN, SHERIFF OF
SHERBURNE COUNTY, individually and
in his official capacity; JOHN DOE DANIELS,
CHIEF JAILER, SHERBURNE COUNTY JAIL,
individually and in his official capacity;
VALERIE LERO, JAILER, SHERBURNE COUNTY JAIL,
individually and in her official capacity;
NANCY RIECKEN, JAILER, SHERBURNE COUNTY JAIL,
individually and in her official capacity,

Appellants,

DONNY DORF, JAILER, SHERBURNE COUNTY JAIL,
individually and in his official capacity;
CITY OF ELK RIVER, ELK RIVER FIRE AND
AMBULANCE SERVICE, STEVEN DITTBENNER,
RALPH BARSODY, JOHN FOLLMER.

Appeal from the United States District Court for the District of Minnesota

Submitted: December 15, 1987
Filed: June 21, 1988

Before LAY, Chief Judge, HEANEY and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

I. INTRODUCTION.

Richard Witschen, Sheriff of Sherburne County, Minnesota; Steven Daniels, chief jailer, Sherburne County Jail; Valerie Lero, jailer, and Nancy Riecken, jailer, (collectively, appellants) together appeal from a district court[1] order denying their motion for summary judgment. The district court disagreed with appellants' assertion that they are entitled to qualified immunity for any violation of Wanda Charlene Boswell's (Boswell) constitutional rights while she was a pretrial detainee in the Sherburne County Jail. Because we agree with the district court, we affirm.

[1]The Honorable James M. Rosebaum, United States District Judge for the District of Minnesota.

II. FACTS.

The district court's denial of summary judgment comes to us as an appealable interlocutory decision because appellants' motion was based on the defense of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). *Mitchell* instructs that we need "not consider the correctness of plaintiff's version of the facts," when reviewing a denial of summary judgment. *Id.* at 528. Therefore, as we illuminate the facts of this case, we do so in the light most favorable to Boswell. *Myers v. Morris*, 810 F.2d 1437, 1459 (8th Cir.), *cert. denied*, 108 S.Ct. 97 (1987).

Shortly after midnight on March 24, 1984, Boswell was arrested for operating a vehicle under the influence of alcohol. She was taken to the Sherburne County Jail in Elk River, Minnesota, to be held on that charge and on warrants for her arrest issued by two other Minnesota counties. While booking Boswell, jailer Valerie Lero learned that Boswell was six and one-half months pregnant and was having a problem pregnancy. Boswell related to Lero that she had had abnormal vaginal discharge, and had fainted three days earlier. She also stated that she was under the care of a physician, and gave her doctor's phone number to Lero. While showering, Boswell discovered that she was bleeding. She immediately informed Lero. Lero gave Boswell sanitary pads before locking her into a cell for the night, but made no attempt to contact Boswell's physician or any other trained medical personnel. Lero failed to record Boswell's bleeding in her log, and neglected to communicate any of the information she had concerning Boswell's medical condition to the next jailer, Nancy Riecken, who relieved Lero at 6:00 a.m.

About 7:00 a.m., Riecken was called by Boswell. Boswell was cramped, bleeding, and in pain, and she asked Riecken to get her a doctor. Riecken refused and told Boswell that she would not be released until she posted bail.

Boswell's pain and bleeding became worse. When she went to the bathroom, she realized she had passed some blood clots and saved them to prove to Riecken that she needed immediate medical attention. As her cramps intensified, she pounded on the cell door for help. When Riecken responded, Boswell showed her the

clots and a bloody sanitary pad. She again requested medical help. Riecken continued to insist that Boswell — whose family was in Onamia, Minnesota, sixty miles from Elk River — post bail before she could be released. Riecken's only concession was to permit Boswell to phone her mother-in-law, Shirley Boyd. Mrs. Boyd assured Boswell that she would try to raise bail, and she told Boswell to have Riecken call her if Riecken did not believe Boswell needed immediate medical attention. When Boswell finished speaking with her mother-in-law, she again asked Riecken for medical assistance; Riecken again refused. Instead, Riecken called Mrs. Boyd, and informed her that Boswell was having some difficulty with her pregnancy. Mrs. Boyd told Riecken that if Boswell was having cramps and passing blood, Boswell needed to get to a hospital immediately, because she had a history of fast deliveries. Mrs. Boyd added that even if she could raise the bail money, it would take her a long time to drive from her home in Onamia to Elk River. Riecken continued to insist that she needed "$150 to let Boswell out."

At some point during Boswell's travail, Riecken notified chief jailer Daniels of Boswell's condition. At Daniels' direction, Riecken contacted the two counties with outstanding warrants, Crow Wing County and Becker County, and attempted to persuade them to authorize her release without bail.[2] Becker County refused, and

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[2] The teletype from Sherburne County Jail to Crow Wing County Jail was as follows:

> We have in custody Wanda Charlene Boswell on DWI. She has a warrant for your co. $50.00 bail. She also has a warrant in Becker Co. She has the bail of $150.00 for this one. **She is 6 mo [sic] pregnant and is starting to bleed.** What would you like done about your bail [sic] We want her out of our facility as soon as possible. Any suggestions?

Crow Wing County responded:

> If she has the bail take it — if she doesn't release her from our charges, we'll try for her later. *We don't want the medical bills either!!!!!!*

Designated Record on appeal at 34 (emphasis added).

Riecken continued to insist that Boswell would have to post bail before she could be released. Neither Riecken nor Daniels took any action to contact Boswell's doctor or any other trained medical personnel. Instead, they left Boswell, cramped and bleeding, to languish in her jail cell while they waited for someone to take Boswell off their hands.

While Boswell's family sought frantically to raise the bail money in Onamia, Boswell's condition worsened. As her cramps became more frequent and intense, she began crying out for help. Riecken took no steps other than to place another call to Mrs. Boyd's home, where she spoke with Mrs. Boyd's husband William and reiterated that bail would have to be posted before Boswell could be released. As Boswell continued to cry for help, Riecken told her to lie down and put her feet up, because nothing else could be done until the Boyds arrived with the bail money.

At about ten o'clock that morning, a local Elk River police officer, Thomas Tyler, stopped by the Sherburne County Jail before beginning his shift. Riecken questioned Tyler, an emergency medical technician, about the signs of miscarriage. When Tyler showed surprise at these questions, Riecken mentioned Boswell. Tyler then offered to look at Boswell. As he walked down the corridor toward her cell, he could hear her cries, which were "quite loud." Tyler found Boswell bleeding and in considerable pain. After a brief examination, Tyler instructed Riecken to call an ambulance. As Boswell was being transferred by ambulance to the hospital, she began giving birth. Her baby, Joseph Boswell, was born at the hospital, where he died thirty-four minutes later.

Boswell filed this 42 U.S.C. § 1983 action against Sherburne County and the appellants in their individual and official capacities, alleging, among other claims, that appellants' deliberate indifference to Boswell's serious medical needs violated her eighth and fourteenth amendment rights. After some discovery, appellants moved for summary judgment, and submitted a supporting memorandum which raised the defense of qualified immunity. The district court denied appellants' motion for summary judgment.

On appeal, appellants maintain that their obligation to provide medical treatment to a pregnant pretrial detainee was not clearly

established at the time this incident took place, and that they are therefore entitled to be immunized against the constitutional claims that Boswell raises in this action.

III. DISCUSSION.

We start with first principles. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), established that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818.

The *Harlow* Court refashioned the qualified immunity doctrine by rejecting any inquiry into an official's state of mind in favor of a wholly objective standard. *Id.* Consequently, in determining whether an official may prevail on his qualified immunity defense, we confine our consideration solely to the purely legal question whether "the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions...." *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985).

This purely legal question is somewhat complicated in this case because Boswell was a pretrial detainee, not a convicted prisoner. Pretrial detainees have not received a formal adjudication of the charges against them and as such are beyond the power of the state to punish. *See Bell v. Wolfish*, 441 U.S. 520, 523 (1979). They are therefore accorded the due process protections of the fourteenth amendment, protections "at least as great" as those the eighth amendment affords a convicted prisoner. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). While it is well-settled that convicted prisoners find protection in the eighth amendment against prison officials' "deliberate indifference" to their "serious medical needs," *Estelle v. Gamble*, 429 U.S. 97, 106

(1976), it is an open question[3] whether the fourteenth amendment provides pretrial detainees with a greater degree of protection against denial of medical care than the *Estelle* "deliberate indifference" standard. *Whitley v. Albers*, 106 S.Ct. 1078, 1088 (1986).

We think it both unnecessary and unwise to rush into an area where the Supreme Court has, as yet, declined to tread — unnecessary because a decision whether the fourteenth amendment provides greater protection for pretrial detainees than the eighth amendment "deliberate indifference" standard is not essential to our resolution of this case; and unwise because this question has provoked various responses from the courts of appeals.[4] Even if we apply the eighth amendment "deliberate indifference" standard of *Estelle*, we are convinced that Boswell has stated her claims against each of the appellants with enough particularity to defeat summary judgment on their qualified immunity claims.

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[3]In two recent cases, *Daniels v. Williams*, 106 S.Ct. 662 (1986), and *Davidson v. Cannon*, 106 S.Ct. 668 (1986), the Supreme Court deemed negligence insufficient to cause a deprivation of due process under the fourteenth amendment, but stopped short of adopting the "reckless or deliberate indifference" standard prescribed by *Estelle*. *See Davidson*, 106 S.Ct. at 673 (Blackmun, J., dissenting). We are thus left without an answer whether the fourteenth amendment provides pretrial detainees with protections greater than or equal to those provided to convicted prisoners by virtue of the eighth amendment "deliberate indifference" standard.

[4]The Fourth, Ninth, Tenth and Eleventh Circuits have held that in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care, the minimum standard allowed by the due process clause is the same as that required by the eighth amendment for convicted prisoners. *Whisenant v. Yuam*, 739 F.2d 160, 163 n.4 (4th Cir. 1984); *see also Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986); *Garcia v. Salt Lake County*, 768 F.2d 303, 307 (10th Cir. 1985); *Hamm v. DeKalb County*, 774 F.2d 1567, 1571-72 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 1492 (1986). Other courts have suggested that a different standard is appropriate. In *Matzker v. Herr*, 748 F.2d 1142, 1147 (7th Cir. 1984), the court of appeals said that a pretrial detainee's rights are violated "when a jailer fails to promptly procure competent medical aid for a pretrial detainee who suffers a serious illness or injury while confined." The Fifth Circuit adopted a similar approach in *Alberti v. Klevenhagen*, 790 F.2d 1220, 1224 (5th Cir. 1986). It is a matter of conjecture whether, on a given factual circumstance, there would be a different result if the *Matzker* test, rather than the deliberate indifference test of *Estelle*, were used.

This court has in the past taken a broad view of what constitutes "clearly established law" for the purposes of a qualified immunity inquiry, requiring some but not precise factual correspondence with precedents and demanding that officials apply general, well-developed legal principles. *Lappe v. Loeffelholz*, 815 F.2d 1173, 1177 (8th Cir. 1987). While we acknowledge that *Anderson v. Creighton*, 107 S.Ct. 3034, 3038-39 (1987), requires that the "contours of the [allegedly violated] right ... be sufficiently clear that a reasonable official would understand that what he is doing violates that right," we are confident that a pretrial detainee's right to emergency medical care was both clearly established and clearly contoured before March 1984, when the incident Boswell complains of took place.

Without attempting to canvass the numerous decisions in this area, we select a few examples. As noted above, *Estelle v. Gamble*, which proscribed prison officials from exhibiting "deliberate indifference to [the] serious medical needs of prisoners," 429 U.S. at 104, was decided in 1976. The Tenth Circuit in 1980 held that delay in providing medical care which resulted in "continued and unnecessary pain" violated the "deliberate indifference" standard of *Estelle*. *Ramos v. Lamm*, 639 F.2d 559, 576 (10th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981). Finally, in 1981, we upheld a section 1983 damage award based, in part, on delay of medical treatment to a pregnant woman, which resulted in the stillbirth of her child. *Herrera v. Valentine*, 653 F.2d 1220 (8th Cir. 1981).[5] These are not a few scattered cases providing first evidence of a right that is just evolving, but rather are familiar landmarks on the legal terrain since *Estelle* was decided in 1976. It is against this background that we evaluate the allegations against each of the appellants.

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[5]Three weeks after the incident at issue in this case, the Second Circuit held that a pregnant inmate who miscarried stated a cognizable claim where she alleged that defendants intentionally delayed emergency medical aid. *Archer v. Dutcher*, 733 F.2d 14, 16 (2d Cir. 1984). The *Archer* court had no doubt that delay of medical care to a pregnant inmate violated the "clearly established" standard of *Estelle v. Gamble*. *Id.*

Jailer Lero

Lero knew Boswell was six and one-half months pregnant and under the care of a physician, whose name and phone number had been provided to Lero. Lero also knew that Boswell had a history of abnormal discharge and had fainted three days earlier, and she learned that Boswell was bleeding and generally was having a difficult pregnancy. Despite this, and despite Lero's knowledge of the significance of bleeding in a pregnant woman, Lero did not contact Boswell's physician or other trained medical personnel, and failed to inform the next shift of Boswell's bleeding. These facts create a jury question as to whether a reasonable jailer in Lero's position would have known that the failure even to inquire of trained medical personnel, or to alert the next shift that Boswell was in danger of having a miscarriage, violated Boswell's clearly established right to medical care.

Jailer Riecken

Boswell's uncontroverted assertions demonstrate that Riecken knew that Boswell was bleeding, cramping and crying, and was starting to go into labor. Boswell repeatedly implored Riecken to summon trained medical personnel, but the facts show Riecken refused to do so until Boswell had already begun to miscarry. We think there is no question but that Boswell has met her burden of alleging sufficient facts to survive Riecken's motion for summary judgment on the ground of qualified immunity.

Chief Jailer Daniels and Sheriff Witschen

Boswell's claims against chief jailer Daniels arise from both his personal involvement in the decision not to obtain medical care for Boswell or to consult trained medical personnel, and his responsibility, along with Sheriff Witschen, for setting jail policy and training and supervising jailers Lero and Riecken.

Appellants assert that Daniels had no input into the decisions regarding Boswell's medical care. However, Riecken's log shows

that Daniels was consulted as Boswell's condition worsened, and that he directed Riecken to try to secure Boswell's release rather than to summon medical assistance. Immediately thereafter Riecken sent a teletype to the Crow Wing County Jail stating that Boswell "is 6 months pregnant and is starting to bleed. ... We want her out of our facility as soon as possible." Daniels' directive, the teletype that put it into effect, and Daniels' deposition testimony that he was always consulted about medical problems at the jail and was the final decision-maker in such matters, are enough to create a genuine issue of fact regarding Daniels' alleged "deliberate indifference."

With respect to Boswell's supervisory liability claim against Daniels and Witschen, it is well established that government officials may be held liable in damages for the constitutional wrongs engendered by their failure to train or supervise subordinates adequately. *See, e.g., Hahn v. McLey*, 737 F.2d 771, 773 (8th Cir. 1984) (per curiam). This responsibility is not premised on the notion of vicarious liaiblity; rather, it is bottomed on the principle that, in some contexts, failure of an official to safeguard against constitutional transgressions by subordinates constitutes an actionable wrong under 42 U.S.C. § 1983. While the Supreme Court has recognized a cause of action for supervisory liability, it has noted important limitations on its application, requiring an "affirmative link between the occurrence [of the misconduct] and the adoption of any plan or policy by [defendants] ... showing their authorization or approval of such misconduct." *Rizzo v. Goode*, 423 U.S. 362, 371 (1976). We have recently held that a plaintiff must link the alleged constitutional violations to the supervisors' conduct by showing that the supervisors were "deliberately indifferent" to the constitutional rights of the plaintiff. *Wilson v. City of North Little Rock*, 801 F.2d 316, 322, and n.3 (8th Cir. 1986).

We think that Boswell has succeeded in forging this link, at least for purposes of withstanding Daniels' and Witschen's motion for summary judgment on the issue of qualified immunity. Most prominent among Boswell's allegations is that inadequately trained jailers were directed to use their own judgment about the seriousness of prisoners' medical needs, rather than being directed to consult trained medical personnel. There is also evidence that Daniels

and Witschen decreed that medical costs should be minimized by, among other things, releasing prisoners if possible to avoid medical expenses. These allegations, and the substantiating evidence, are sufficient to establish a colorable claim of liability on the part of the supervisors. *See, e.g., Miranda v. Munoz*, 770 F.2d 255, 260 (1st Cir. 1985). Moreover, Boswell has presented more than a modicum of statistical evidence that shows that medical expenditures at the jail have fallen in each of the last three years, statistical evidence which buttresses Boswell's allegations that Daniels and Witschen instituted a policy of denying prisoners at the Sherburne County Jail adequate medical treatment in order to cut costs.

Taken together, the evidence presented against appellants states with particularity the circumstances under which each violated Boswell's clearly established right to medical care. As both constitutional and case law make clear, pretrial detainees are entitled to the same due process protection as ordinary citizens. While it remains to be seen whether Boswell can demonstrate each appellant's culpability to the satisfaction of a jury, we hold that Boswell has presented sufficient evidence to withstand a motion for summary judgment.

Accordingly, the decision of the district court is affirmed.

A true copy.

ATTEST:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

United States District Court
District of Minnesota
Fourth Division

Civil No. 4-86-156

WANDA CHARLENE BOSWELL,

vs.

COUNTY OF SHERBURNE, et al.

ORDER

This matter is before the Court on the motion of defendants Witschen, Daniels, Lero, Riecken, and Dorf for summary judgment. A hearing was held on March 19, 1987. Based on the files, records, and proceedings herein, and for the reasons set forth at the hearing, IT IS ORDERED that:

1. Defendant Dorf's motion for summary judgment as to plaintiff's Eighth Amendment claim as applied to the States through the Fourteenth Amendment is granted.

2. The remaining defendants' motion for summary judgment is denied.

Dated: March 19, 1987

JAMES M. ROSENBAUM
United States District Judge